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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INTERNATIONAL CONSULTATION "ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE DEVELOPMENT ACTIVITIES OF INTERNATIONAL INSTITUTIONS" ORGANIZED IN COOPERATION WITH THE HIGH COUNCIL FOR INTERNATIONAL COOPERATION (FRANCE)

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Strategies for the development and revival of economic and social rights*

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Summary

This paper is centred on the theme of economic, social and cultural rights and development strategies, in the context of globalization and the new conceptual paradigms devised by multilateral organizations. The globalization of the economy presents both a risk and an opportunity for economic, social and cultural rights and oddly enough for development strategies. Because it either causes or further widens at times unbridgeable gaps between the economic standards of individuals or groups in all countries (both developing and developed), economic globalization offers a fresh opportunity to reconsider the role of international and regional organizations and of their member States on the one hand and the effectiveness and universality of fundamental rights on the other. In view of the risk of normative "chaos" or "cacophony", which economic operators do their best to foster, there is a need also to take a fresh look at the question of a new ordering or new architecture of legislative diversity (particularly in relation to hard law and soft law) and institutional diversity (in particular in relation to the United Nations system and Bretton Woods). Although fundamental social rights are undeniably linked to the prevailing degree of democracy or level of development, judging their effectiveness according to purely economic criteria might cause them to be denatured or might expose them to exploitation. An illustration of this sort of problem would be the question of child labour and rights of association and collective bargaining.

The first part of the paper therefore examines a series of factors, which were the consequences of specific development strategies and which contributed to the recognition of economic and social rights. This recognition has of course been more limited in some multilateral actors than in others. The Bretton Woods institutions, for instance, have been restricted by their apolitical mandate. The factors include the crises of emerging countries and the related involvement of the private sector, growing inequalities between countries, the existence of patches of poverty in middle-income countries, the existence of regions caught in poverty traps, like sub-Saharan Africa, the mediocre success achieved by development aid and the confusion arising between solutions to development problems and international trade reforms, and the reshuffle of the winners and losers of economic reforms, affecting unskilled workers in particular. Although there has been a more generous approach to the compensations and safety nets offered to losers, and although aid reform has come to focus on the struggle against poverty, the countries concerned may end up entangled in their own arrangements. The second part of the paper analyses the responses of the multilateral system and the new risks those responses give rise to, as well as the emergence of social rights and standards, which themselves give rise to risk and debate within the multilateral system and with the actors of the world of labour and civil society. These risks, tensions and debates are illustrated with the two examples of child labour and the rights of association and collective bargaining.

1. Globalization - the new leitmotif of the development debate - is an all-embracing concept with many meanings, which give rise to as many misunderstandings regarding its positive or negative effects. The negative effects are related to the primacy of capital, which enjoys near perfect mobility, over labour, which is much less mobile, to the intensification of worldwide competition, to the demands of competitiveness, to the mass production of increasingly cheap products and to unacceptable working conditions in some regions of the developing world (the "race to the bottom"). These negative aspects of globalization have, however, encouraged the emergence and the recognition (or the renewed recognition) of "global" universal economic and social rights by the international organizations. These rights had already been given recognition in the series of conventions adopted by the ILO in the course of the twentieth century.[1] They underwent a revival at the end of the 1990s, especially with the adoption on 18 June 1998 of the ILO Declaration on Fundamental Principles and Rights at Work. The Declaration listed four core labour standards which all ILO members have an obligation to respect, namely freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

2. This revival, however, has proved to be an ongoing process and is giving rise to much debate. This is partly because the recognition of economic and social rights challenges the economic trends which underlie the notion of globalization, such as the intensification of international competition, the move towards deregulation and the reconsideration of the traditional role of States in terms of social policy and their ability to afford their citizens social protection. The recognition of economic and social rights also has to take account of the intellectual traditions and historic paths followed by developing countries and their institutions. One example is emerging countries, which have based their growth on labour-intensive industries and some of which contest the universality of rights defended by an "international community", seen as defending not the interests of that community but private interests in wealthy countries and disguised protectionist strategies. One such case was the notion of "Asian values" in the mid-1990s, that differed from Western values concerning political freedoms and labour relations and that highlighted the relative nature of universal economic and social rights.

3. The revival of economic and social rights further comes up against the variety of mandates of the multilateral agencies that make up the "international community". While the Bretton Woods institutions, for instance, have gradually been taking account of these rights in their thinking,[2] some of the rights, such as the right of association, impinge on the internal political machinery of States and are incompatible with the apolitical mandates of the Bretton Woods institutions, such as the World Bank's Articles of Agreement. The same goes for other multilateral entities, such as WTO, whose prime objectives are centred on facilitating open trade and whose founding principles do not include labour rights.

4. The revival of economic and social rights has occurred on two levels, the level of the factors and lessons derived from development strategies, and the level of concepts, which have provided a favourable background to new thoughts about economic and social rights (I). Its effect has been to accentuate the centrality of economic and social rights (II).

I. FACTORS, DEVELOPMENT STRATEGIES AND CONCEPTS: THE NEW CONTEXTS OF THE REVIVAL OF ECONOMIC AND SOCIAL RIGHTS

5. The new contexts of the revival of economic and social rights may be related on the one hand to global crises (A) and on the other hand to globalization (B).

A. The new context induced by global crises

1. Crises and the new international architecture

6. Globalization has projected economic crises on an unprecedented scale, giving rise to the fear of a systemic risk, especially since the crises have been unlike any in the past as far as their causes were concerned. Thus the Asian crisis and the crises that followed - in Russia and Brazil - made the developed countries reconsider the notion of crisis,[3] as they feared the risk of contagion facilitated by the globalization of financial markets. By contrast with the macroeconomic factors underlying most of the previous crises, the recent crises were blamed more on the private sector, with an emphasis on microeconomic causes, such as defaults, recklessness, speculation and a lack of transparency in the behaviour of banks and private firms.

7. For the Asian crisis which began in 1997, the social consequences were spectacular and were given extensive press coverage. A new feature was that the countries affected were not the poor ones but emerging countries, some even members of OECD (in Korea's case), which had not been following blatantly extravagant economic policies, like other developing countries, and some of which had been careful with their budgets. This series of factors - with a risk of the crisis spreading to rich countries and serious social consequences for countries enjoying high social standards - brought accusations on the part of academics[4] and the civil societies of the countries concerned, who blamed multilateral agencies for aggravating the crises and their social consequences. This in turn induced a serious reconsideration of the methods of organization and action of the Bretton Woods institutions by the global actors involved, such as Governments and civil societies, but also within the institutions themselves.

8. The first reaction was to consider reforming the roles of the Bretton Woods institutions and the mandates of the International Monetary Fund and the World Bank, especially in the United States with their traditional mistrust of multilateralism (the "Meltzer" report), and to discuss the new "international architecture". A second reaction was to bring "social" themes to the forefront and to concentrate on such topics as the role of social policies, social protection arrangements, the nature of effective safety nets suited to developing countries and the diversity of their situations, amongst others.

2. Inequalities and poverty

9. Simultaneously, in the last decades of the twentieth century, inequalities increased, both within countries and between countries: in 1960 per capita GDP of the 20 richest countries was 18 times greater than that of the 20 poorest countries, and by 1995, 37 times.[5] In 1998, poverty still affected 1.17 billion people in developing countries, even though its incidence

declined from 28 per cent in 1987 to 23 per cent by 1998.[6] The gap between the performances and situations of developing countries has also increased, splitting the latter category apart in terms of both growth rates and human development indicators. Between the 1960s and the 1990s, the growth rates of low-income countries fell, like those of middle-income countries, and their dispersion increased.[7] Some regions like Asia made spectacular progress in terms of GDP growth and human development (education and health) growth, as well as in terms of equity - with a decline in the years preceding the crisis. China underwent continuous growth and overcame its poverty in the 1990s. In a country like Indonesia, however, the 1997/98 crisis led to a doubling of the poverty incidence compared with before the crisis. These sharp variations also affected Korea (with poverty incidence in urban areas rising from 8.6 per cent to 23 per cent at the peak of the crisis, then falling back to 15.7 per cent by end 1998) and Thailand.

10. Other regions collapsed, like some of the transition countries, especially in the former Soviet Union. Thus in Russia poverty rose from 11 per cent in the Soviet period to 43 per cent of the population in 1996, and has probably risen further since the 1998 crisis. Other regions have stagnated or give evidence of their vulnerability in the volatility of their indicators, as in Latin America. Thus, contrary to the forecasts of economic theory, the expected convergence with the more developed countries has given way to divergence and the constitution of several groups of convergence countries or "clubs".[8] In addition, even in emerging or middle-income countries, patches of poverty have been detected, hidden under national averages. These often affect special geographical areas or social groups, highlighting the emergence of regional inequalities within countries.

11. Some areas, particularly in sub-Saharan Africa, which has the highest proportion of persons in the world living on less that $1 a day, appear to be caught in real "poverty traps", where several factors are combined and reinforce each other (e.g. absence of demographic transition, epidemics, illiteracy, etc.). Africa is the region with the most massive influx of international public aid since the raw materials prices crisis in the late 1970s. That was one reason, among others, why serious doubts were expressed about the effectiveness of public development aid, at a time when the amounts given by donor countries fell sharply during the 1990s. A kind of free-fall of financial flows set in, in response to the loss of international credibility by the poorest countries, particularly in Africa, and the almost total lack of private capital flows to those countries (foreign direct investment (FDI) or portfolio) apart from a few natural resource extraction niches in a very small number of countries.[9] Public aid tends to be concentrated in some regions, such as sub-Saharan Africa, and small poorer countries - even though it also finds its way to medium-size countries for geopolitical reasons. However, some low per capita GDP countries can be so large that the proportion of aid is very low, as in India, another major poverty area apart from sub-Saharan Africa. By contrast, the emerging countries, especially in Asia, receive an influx of private capital (China being the number one FDI recipient).

12. Thus poverty emerged as the new paradigm for the activities of the donor community, and the leitmotif of poverty reduction has become one of the major reasons justifying aid agencies, both multilateral and bilateral.[10] A reconsideration of aid reform, following the realization of the ineffectiveness and inconsistency of aid, led to studies advocating a more selective approach and the establishment by the Bretton Woods institutions of new aid

frameworks focused on the struggle against poverty and the participation of the Governments and civil societies of recipient countries (PRSPs or Poverty Reduction Strategy Papers), to which bilateral and other multilateral donors also subscribe.

13. Against that background, a fresh emphasis has been placed on economic rights. Nevertheless, this new approach remains influenced by two related paradigms of factors and related attitudes and policies. These are opposed from the point of view of the scale of the development of aid and trade and correspond to different geographical areas. In the poorest countries, especially in Africa, the question of labour rights has been overlooked as a result of their dependence on external public aid, the preponderant role of the Bretton Woods institutions and the lack of foreign investment and hence of transnational firms. This first paradigm is in contrast with the integration in world trade and investment flows of the market structures of emerging countries, which have historically been associated with considerations regarding the effects of trade and globalization and attitudes concerning rights. There is a danger that the paradigm of public aid and assistance, as applied to the poorest countries, may lock these countries inside their own type of institutional arrangements. The connection between aid and rights - like the connection between aid and trade or the foreign investments of transnational firms - is only just beginning to take shape.

B. Globalization and international trade: winners and losers

1. The liberalization of trade

14. Globalization has attracted much opposition and criticism, probably more as a paradigm than as a complex set of factors which are difficult to identify and which have already affected certain historic periods. The criticism has centred on the multilateral entities, i.e. the WTO, especially since 1999 (the "Seattle effect") and the Bretton Woods institutions. And it has become more vocal and effective in so far as it has taken advantage of the technical opportunities offered by the globalization of information networks and the expansion of new communication technologies.

15. The recent period has been marked by the globalization of trade: while real global GDP increased by 4.1 per cent in 2000 (estimate), world trade increased by 12.5 per cent over the same period.[11] This has led to several consequences. One of these concerns the private transnational firms of rich countries and their interests, which have been increasingly scrutinized for the "ethical" aspect of their activities in developing countries.

16. Another consequence concerns the validity of the "Washington consensus", i.e. of all the reforms recommended by the Bretton Woods institutions and by the WTO to developing countries, especially trade liberalization. Some of the premises of the consensus have now been brought into question, such as the belief that liberalization has a positive effect on growth, and that growth automatically has a positive effect on poverty. These causalities do not always work but only under certain conditions (e.g. subject to the availability of certain markets such as a credit market, or the absence of excessive inequalities). They always give rise to lively controversy in the academic world, with some authors drawing attention to the danger of confusing the benefits of trade liberalization with those of development.[12] They have also been

strongly denied by some academics, political activists and civil society associations in developing and emerging countries, who have emphasized the negative effects of trade liberalization reforms in certain situations, producing not only winners but also losers.

17. These negative effects impact poverty in the first place. The relations are more complex than a simple positive link between open trade and less poverty, since open trade can in some cases even increase poverty,[13] or at any rate induce patches of poverty in sectors of activity which do not benefit from the increase in international demand created by the opening up of trade. Trade liberalization also has effects on income distribution, and even though it generates economic gains in the aggregate, it can also increase inequalities. Where State controls, for instance, benefited the poorest groups, liberalization reforms have increased inequalities.[14]

18. The negative effects then reappear on the labour market. Despite the positive predictions of classic international trade theories, labour markets can be negatively affected by liberalization reforms, which are fatal to activities formerly enjoying State protection and subsequently proving uncompetitive, and which as a result destroy jobs and generate unemployment. This happened to many formal industrial sectors in sub-Saharan Africa, which were obsolete and unable to face international competition at the time of the first structural adjustments in the 1980s. The expected benefits of open trade may in addition have no effect on sectors which produce non-tradable goods. They may also be attenuated as a result of insecure working conditions in some occupations or the precarious status of certain groups of workers (such as migrant workers or workers in tax-free areas). These effects may be linked to the much analysed consequences of technical progress, which increases inequalities in domestic labour markets by depreciating the value of unskilled labour in the case of a relative decline in international demand for such labour. At the same time, the greater mobility of capital tends to undermine labour's negotiating power in relation to capital.

2. The debate about labour standards

19. These developments have favoured the emergence of an "international civil society", which is increasingly critical and globalized, and simultaneously a revival of the attention paid to economic and social rights within the international community. The WTO prohibits the work of prisoners and encourages cooperation with the ILO to develop basic labour standards, but its positions are considered inadequate by many actors, especially since its intrinsic limitations were highlighted with the failure of the Millenium Round at the end of 1999. The Bretton Woods institutions have responded on several levels. In the first place, their line of defence is that in the medium term reforms bring about an improvement in general welfare and greater economic efficiency. They offset negative effects by incorporating various compensation arrangements and safety nets in the design of reforms, as well as measures specifically intended to benefit the losers. The points at issue concern the size of those groups and the density of their links with the rest of society (links within households or between town and country) and the socially acceptable time horizon for reforms to produce positive results. For the individual, the medium term may prove to be unacceptably long.[15]

20. The Bretton Woods institutions have also considerably increased loans focused on social sectors and have paid increasing attention to social policies, social protection, safety nets and social funds, by analysing more carefully the sort of instruments previously intended more for

the developed countries, following the Asian and subsequent crises (with measures focusing on insurance, unemployment and training). They have also taken core labour standards into account, although these have met with a certain reluctance.

21. These hesitations are due to several reasons. They arise partly from the actual mandates of the institutions, which prevent them from interfering in the internal affairs of member countries. While there is a clear consensus regarding forced labour and child labour, for instance, there is less unanimity regarding freedom of association. The hesitations are also related to the economic theories considered by the Bretton Woods institutions. While labour standards are recognized as being important for welfare and economic efficiency, there is less consensus regarding the best ways of achieving the working conditions they advocate. Moreover, the absence of labour standards is considered to be a consequence of poverty. Trade sanctions are seen as counterproductive and ineffective, as it is thought that pressures using trade sanctions to enforce labour standards may jeopardize the developing countries' access to international markets while yielding limited benefits in terms of welfare. Sanctions may also be appropriated by protectionist private interests, in which case they may improve the situation only of limited sectors, and in fact prove harmful to developing country workers who produce embargoed goods. Market incentives for employers may prove effective complements to State-imposed standards.[16]

22. Rights in this case are analysed in terms of competitive advantages. In theory if there are no rights competitive advantages are weak, and economic growth and the market are considered as positive mechanisms for labour standards. The perverse effects arguments have been scrutinized in detail in labour economics. Thus worker protection may be adversely affected by a multiplicity of worker categories, while defending the interests of some economic sectors may lead to neglecting the interests of others - according to the theory whereby "insiders" tend to protect their interests against "outsiders" in the labour market.

23. But the issues are still very much debated. There is no proof that labour standards increase labour costs or that they affect a country's competitiveness either way.[17] Some econometric studies show that labour standards do not penalize countries that implement them, while conversely the absence of standards does not produce a competitive advantage for developing countries which have made that choice.[18] Thus a country like India, disproving this hypothetical link between the lack of standards, poverty, open trade policies and the search for competitiveness, has sought to enforce basic labour rights.[19]

24. In the end, the issue remains political, insofar as a link is established between respect for labour standards and trade liberalization agreements, in view of the intrinsically geopolitical nature of such agreements. The link between trade or market access and labour standards is not economically justified in terms of efficiency.[20] The developed countries - i.e. the trade unions, Governments, firms and civil society - headed by the United States, have worked to promote labour standards. By contrast, the developing countries deny the link between labour standards and their access to international trade. They consider that the labour standards advocated by the developed countries are merely a form of disguised protectionism, that the concessions demanded are not reciprocal but merely at their expense, and they claim the right to chose their own development path so long as the freedom of action they are allowed under globalization is much more restricted than that enjoyed by the industrialized countries in the past during their

take off period. The industrialized countries in fact adopted labour standards only at a late stage in their development. In this contrary stance, the developing countries are backed up, obviously for different reasons, by the multinationals.[21]

25. At the same time, other analysts consider that the existence of democratic institutions and the possibility that citizens have of participating in their society's political activities and voicing their opinions freely not only has no negative effect on economic growth, but may even become a positive factor.[22] Some even consider that the Asian crisis was aggravated by the lack of openness and publicity of debates, the low level of democracy and the absence of protection for individuals.[23]

26. These analyses follow the tendency to believe in links between democracy and political freedoms, participation, equity and equality, efficiency and economic growth, as opposed to conventional economic wisdom which has prevailed until recently and which opposes equity and efficiency.[24] Taking up a theme that was never addressed before, a large amount of academic writing is now concerned with the negative effects of inequalities and redistribution disputes on economic growth.[25] Still from an economic point of view, societies with powerful latent social conflicts, for instance very unequal societies, which are not equipped with institutions able to manage those conflicts, appear less able to cope with external shocks, such as worsening terms of trade and the domestic distribution disputes that arise as a result.[26] On the other hand, the existence of civil liberties and political rights, of social insurance arrangements, and of participation by non-elite individuals, tend to improve this ability to cope with shock.[27]

27. So multilateral agencies have gradually been developing an approach based on global public goods, which was taken up by UNDP in 1999.[28] The issues concerning universal labour rights fit naturally into this approach. It provides a means of dealing with the risks and vulnerabilities affecting States and infra-national situations, involving households and individuals, not at an intergovernmental or international level, but at a global level. With the advantage over the currently dominant economic paradigm that it needs no argument calling for assistance to the underprivileged, it rests on the awareness that social and economic problems are henceforth global and may depend on causes situated beyond the capacities of national States, particularly externalities generated by globalization, and that it is impossible to dissociate ethnical objectives of social justice from political and economic processes.

II. THE CENTRALITY OF ECONOMIC AND SOCIAL RIGHTS

28. All summit meetings now tend to offer an opportunity to assert the centrality of economic and social rights. So this is probably the right time to lend a new impetus to the universality of these rights (A) and to re-examine the effectiveness of economic and social rights from a new angle (B).

A. The universality of economic and social rights receives a fresh impetus

29. Paradoxically for some but naturally for others, it is thanks to economic crises and globalization that economic and social rights have earned a universality "bonus", which has led to a revival of standards (1) and to a reorientation of their theoretical foundation (2).

1. The progress of the universality of economic and social rights in recent international legal instruments

30. Two major events marked the end of the twentieth century. The Declaration and Programme of Action for Social Development[29] was adopted on 12 March 1995 following the Copenhagen World Summit for Social Development, and the ILO Declaration on Fundamental Principles and Rights at Work plus Follow-up was adopted on 18 June 1998 following the 88th International Labour Conference.

31. In what way have these two international instruments added a new impetus to economic and social rights?

32. Despite the fact that its adoption was greeted with silence in the press and scientific circles and aroused little interest,[30] the Copenhagen Declaration may be regarded as a cornerstone of the subsequent 1998 ILO Declaration. Moreover, compared with the human rights Declarations and Covenants adopted by the United Nations and/or regional organizations, the Copenhagen Declaration marks a significant new departure. On the one hand it put an end to the primacy of political rights and liberties over economic and social rights. On the other hand, in opposition to liberal reasoning, it asserted the primacy of human rights and needs over economic laws. Thus full employment is promoted as a basic priority of economic policies by ensuring "appropriately and adequately remunerated employment ... with full respect for workers' rights". It also advocated the principle of respect for ILO Conventions, especially those on the prohibition of forced and child labour.

33. While giving the primacy to social issues, the Copenhagen Declaration follows a reasoning developed by the ILO according to which the universality of economic and social rights does not depend on unique development or political models. By rejecting any idea of social, economic or political conditionality in the Declaration, the United Nations stole a march on the practices of States or groups of States and enterprises based on the social clause technique.

34. Under the terms of its mandate as confirmed by the 1995 World Summit and the 1996 WTO inter-ministerial meeting in Singapore, the ILO adopted the Declaration on Fundamental Principles and Rights in 1998. Having managed to identify a kind of "hard core" of fundamental principles and rights, the ILO opted for the declaration technique (little used until then). Unlike international conventions, the Declaration applies to all countries which have accepted the ILO Constitution, whether they have ratified the ILO's basic conventions or not. The Declaration, following up the notions developed in Copenhagen and in Singapore, has no constitutive value, in that it does not establish any fundamental rights. While by its legal nature it does not create any perfect obligation but only duties for all ILO members, the Declaration introduced an original monitoring mechanism, which had a mobilizing and to some extent liberating effect.

35. The Copenhagen Declaration and the ILO Declaration really did create a new dynamic among Member States. Most of them went along with the reporting game in the follow-up to the 1998 Declaration and the Copenhagen Summit. There was also a noticeable move to ratify the Conventions mentioned in the 1998 Declaration. Two years after it was adopted,

the 1998 Declaration became the reference for the world community and international bodies (including the Bretton Woods institutions). That was one of its strengths, insofar as it is not neutral since one of the fundamental rights it lists is freedom of association and collective bargaining. It is true, however, that the ILO Declaration "bypassed" the right to social protection, although this right is so closely connected with the question of employment that lies at the heart of the Copenhagen Declaration.

36. The two Declarations share a twin concern, regarding the consistency of new standards and the convergence of commitments by the organizations, the United Nations and the ILO. They provided an opportunity to renew the ILO's mandate, but at the same time to reposition it and reintegrate it within a broader programme, namely social development, taken on by the United Nations system as a whole. This programme needs to be effectively taken into account, however, in the practices of all international organizations, regardless of their individual scope.

2. The progress of the universality of economic and social rights in the practices of international organizations

37. A number of international organizations, particularly the Bretton Woods bodies, have accepted the idea of adding a social dimension to international trade, in particular by respecting the fundamental rights of workers.[31] In 1998, the IMF started giving strong support to fundamental labour standards based on the idea that the development of participation and democracy were essential for sustainable growth. The World Bank for its part launched a new development framework integrating a whole range of social aspects in its development strategies.

38. Nevertheless, some social rights still run into trouble. Freedom of association is still regarded as a danger for the market. This is one point, in fact, on which the ILO, the IMF and the World Bank disagree strongly. For the ILO, tripartism on a national level is a precondition for achieving the organization's objectives. Freedom of association and collective bargaining, which are the pillars of tripartism, uphold all other fundamental rights. The World Bank's attitude is based on its notion of an exclusively economic mandate, implying a refusal to intervene in the domestic policies of member States. Without derogating from its own agreements, however, the Bank has come to accept the need to be more active where child labour is concerned, since this is one of the cruellest manifestations of poverty. This favourable attitude does not stretch to freedom of association, which is sometimes violently attacked, although Amartya Sen has clearly demonstrated that social dialogue (freedom of association and bargaining) and more broadly speaking democracy (economic freedom) can provide a safeguard against famines.[32]

39. The privatization of social security systems as a precondition or as a tacit effect of operations conducted in countries by international financial agencies does to some extent jeopardize the right to security of workers in a liberal economy. It leads to forms of social disintegration which are contrary to one of the commitments of the Copenhagen Summit. According to the report of the United Nations Secretary-General for the special session on the follow-up to the 2000 Copenhagen Summit, "Social protection can also be viewed as an investment and in fact a good investment, leading to greater labour productivity". Thus it appears increasingly clearly from the organizations' reports that employment and poverty can

only be dealt with by taking account of the right to protection against social risks. This "forgotten" right of the ILO's 1998 Declaration has on the other hand been developed in the Council of Europe's revised European Social Charter and in the Nice Charter of Fundamental Rights of the European Union.

40. In 1999, the ILO Director-General proposed a common aim for the international community and hence for all international organizations in the form of decent work. "The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity."[33] This new concept is a powerful vehicle which gives the social question a global dimension.

41. It has to be global, because merely creating jobs is not enough; the jobs have to be decent in the meaning given by the ILO Director-General, that is, for developed countries jobs that are not affected by uncertainty and insecurity, and for developing countries jobs in the unstructured sector with social protection. Although employment has improved in some regions of the world, the new jobs are often insecure and poorly paid and do not offer proper social protection. Merely having a job, far from being a guarantee of being free of poverty, may prove to be a poverty trap. The phenomenon of "employed indigents" or poor workers affects all countries in all regions. Even France has just detected signs of "working poverty" within its own borders.[34] Basing development on the principle of decent work is a way of adding a global dimension. Labour rights, employment, social protection and social dialogue are inseparable. The notion of decent work warns economic and financial organizations, in their economic intervention programmes in countries, against ignoring the fact that the fundamental rights listed in the 1998 Declaration should be seen as a whole, to which the right to social protection has been added.

42. In the conclusions of the report for the special session in 2000 on the follow-up to the Copenhagen Summit, the Secretary-General states that "The new spirit of consultation and collaboration between the United Nations and its specialized agencies, the Bretton Woods institutions and other organizations ... is underpinned by a growing recognition that economic and social policies are not only intertwined, but rather part of the same whole". Having rallied to the 1998 ILO Declaration, the international organizations now have to show that their practices comply with its terms.

B. The effectiveness of economic and social rights reconsidered

43. The Copenhagen Declaration and the ILO Declaration have to be seen as clear indications of a halt to delegalization on a global scale. It even seems as if a move has begun towards international re-regulation. Could this be the sign of a real or at least a new departure for international social law?[35] The social issue is not a cause which is spontaneously shared. It has to be raised, but also imposed, through acts which, despite the fact that they are not binding, carry more than a symbolic significance, causing a profound change of outlook. It provides the necessary elements for new forms of standard-setting on a global scale (1), which will potentially destabilize the traditional legal order (2).

1. New modes of standard setting

44. There has been an increasing variety of sources of international law, especially with the proliferation of "concerted non-conventional acts" and "guidelines". The ILO has used the technique at least twice: in its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted in November 1977[36] and the 1998 Declaration on Fundamental Principles and Rights at Work and Follow-up thereto. This latter Declaration places member States squarely before the ILO Constitution by declaring that all members, even if they have not ratified international conventions protecting the fundamental rights in question, have an obligation, arising from the very fact that they are members of the Organization, to respect, to promote and to apply those rights in good faith. Those are the rules.

45. These Declarations are intergovernmental commitments, the legal nature of which is not strictly defined. Their aim is less to oblige than to convince the recipients of the texts, which are primarily recommendations. Both texts are based expressly on voluntary commitment, and any failure to respect them is not legally punishable.[37] "Although they are not compulsory in character, they act as an instrument of moral persuasion, strengthened by the authority of international organizations and the support of public opinion."[38] This soft law[39] produced by international bodies is aimed at creating an international framework for the development of voluntary social initiatives by enterprises as well as States. Thus international labour law is experimenting with allowing the two types of standards to coexist, one aimed at legislation and the other at regulation.

46. The multilateral approach of these Declarations is far preferable to unilateralism, whether aggressive or not. They confirm the preference for voluntary commitment and persuasion over coercion or sanctions. They tend to encourage a sense of dynamism, but without forgetting effectiveness. It is quite possible that these Declarations, these new forms of regulation to some extent produce an instructive and stimulating effect. They are based on cooperation, support and assistance, particularly technical assistance, which are now essential for any assessment of the effectiveness of standards. Sanctions, especially economic, are no guarantee of effectiveness. On the contrary, they have perverse and destabilizing effects, which can lead to a deterioration of existing situations and which make any global approach to the social issue more difficult. According to the Secretary-General's 2000 report on the follow-up to the Copenhagen Summit, economic sanctions have reduced the growth capacity of the countries affected, where the number of poor has increased.

2. Towards a new legal architecture

47. Due to the interdependence between social issues and the particularly complex objective of social development, the competent organizations have been led - or obliged - to cooperate either within or outside the United Nations and regardless of whether their mandates are social or purely economic. Of course that still leaves the problem of devising some legal coordination machinery, on the basis of which a set of "integrated" international social laws could be built up, despite the diversity of partial legal systems constructed by international organizations in the light of their constitutions.

48. Moreover, the established centrality of economic and social rights has given rise to many experiments in recent years, not only by international agencies but also by international non-governmental organizations and by private economic actors. These experiments, conducted more in the name of ethics than of law, have given rise to a proliferation of standards collected under the commonly accepted "catch-all" term of soft law. But soft law takes on substance in the legal system only if declaration is followed even partially and gradually by implementation.[40] The 1998 ILO Declaration definitely fits into this category. It creates or contributes to "effectiveness in action".[41] Nevertheless, might the Declaration not be depreciated owing to the proliferation of "competing" standards issued by other international agencies or by private actors, who are seeking their share of social action and standard setting. Merely listing all the standards (such as Global Compact, Social Accountability 8000, the Global Sullivan Principles, etc.) and classifying them becomes a complex task. There is no doubt that the centrality of economic and social rights has been the source of "diluted" and inflationary standard setting. Admittedly all these standards reflect the emergence of a truly global legal opinion. But they create a risk of "cacophony" which is prejudicial to the legal security of actors, that is, to workers as well as enterprises. While respecting the notion of legal diversity and recognizing that the pyramidal approach to legislation belongs to the past, it is worth remembering that not only legal rationality but also legal security demand a degree of rationality, which means instituting order and avoiding any depreciation of the rule of law at international level.

49. International social law is intergovernmental law. But globalization transcends the intergovernmental sphere and leads to a proliferation of actors, including civil society, in all its many and varied forms. States still remain at the heart of standard-setting machinery, even though they no longer possess the technical capacity to legislate on their own and even though they are inevitably forced to negotiate and to share their legislative powers in open legal systems and in networks. Even if the revival of economic and social rights entails a reorganization of the legal order, rights will only be effective if States are strong and able to implement extended solidarity policies. This is also a condition on which implementation of such a vast undertaking as social development will depend.

Notes

[1] A history of the conventions is given in Cruz et al. (1996).

[2] Holzmann (1999).

[3] Stiglitz (1999).

[4] For instance, by well-known academics such as Jeffrey Sachs or Paul Krugman; see also the many points of view gathered on the Web site of Nouriel Roubini (http://www.stern.nyu.edu/~nroubini).

[5] World Bank (2000a, p. 51).

[6] Measured on the basis of $1 per day (PPP); World Bank (2000b).

[7] Kohl and O'Rourke (2000, p. 37).

[8] World Bank (2000a); Pritchett.

[9] Sindzingre (1998).

[10] Séverino (2000).

[11] World Bank (2001, p. 2).

[12] Rodrik (2000).

[13] Winters (2000).

[14] World Bank (2001, box 1.3).

[15] Kanbur (2000).

[16] World Bank (2001); World Bank (2000, p. 74).

[17] Martin and Maskus (1999); Mehmet et al. (1999, chap. 6); World Bank (2001).

[18] Raynauld and Vidal (1998, chap. 3).

[19] Castle et al. (1999) on the example of child labour.

[20] Panagariya (2000), who recalls that this link was suggested in the first place by the United States.

[21] A review of the literature concerning the link between labour standards and international trade is given in Brown (2000); the issues at stake between developed and developing countries are reviewed in Singh and Zammit (2000).

[22] See Sen (2000a).

[23] Sen (2000b).

[24] Stigliz (2000).

[25] See Kanbur and Lustig (1999).

[26] Rodrik (1998).

[27] Rodrik (1999).

[28] Kaul et al. (1999).

[29] J. Baudot (1996), p. 37.

[30] Only the ILO, NGOs, and trade union confederations showed any real interest at the time.

[31] F. Maupin (1996), p. 45.

[32] A. Sen (2000), p. 129.

[33] ILO (1999), p. 3.

[34] S. Ponthieux, P. Concialdi (2000), p. 5.

[35] R. Charvin (1997), p. 657.

[36] ILO, "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Official Bulletin, Vol. LXI, 1978, Series A, No. 1, Geneva. Before the ILO, on 21 June 1976, the OECD Council, in a quite different spirit, adopted a Declaration on International Investment and Multinational Enterprises, which includes a text entitled Guidelines for Multinational Enterprises, the last version of which was adopted by the Council of Ministers on 27 June 2000.

[37] E. Decaux, (1983), p. 81. P. Sanders (1987), p. 281.

[38] United Nations document E.5500, p. 55, cited in B. Goldman, Ph. Francescakis (under the direction of), "L'entreprise multinationale face au droit", Litec. 1977, p. 417.

[39] Expression used by internationalists, see R.J. Dupuy, (1975), p. 132.

[40] P.M. Dupuy (2000), p. 373.

[41] Ch. de Visscher (1970), p. 318.

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